



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 379 OF 2017

ESTHER WANJIRU MAINA.....CLAIMANT

VERSUS

BOM KARATINA DEB PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the alleged unfair and unlawful dismissal from employment. The Claimant averred that she was employed in June 2000 as a clerk earning Kshs. 4,500/- which was raised to Kshs. 7,500/- then 12,000/- and finally to Kshs. 15,000/- in January 2016, the salary he earned at the time of dismissal. She averred that she fell ill and was admitted at Jamii Hospital and later at Coptic Hospital Nairobi. she averred that while she was off duty pursuant to 2 weeks leave up to 24th May 2017, when pupils visited her in her residential house. The Claimant averred that the Principal became angry and issued her with a letter dated 29th May 2017 alleging gross misconduct. She averred that she wrote an apology letter dated 17th June 2017 in reply to the Principal's letter dated 29th May 2017. The Claimant averred that she was on 21st July 2017 issued with a letter of summary dismissal and that she was not given any notice or reason for her termination. She averred that her services with the Respondent were prematurely terminated unfairly and illegally. She averred that demand and notice of intention to sue were issued but were ignored. She thus sought general damages for unlawful dismissal, one month's salary in lieu of notice, annual leave allowance from 2000 to 2017 – Kshs. 255,000/- plus costs of the suit.

2. The Respondent in the defence filed herein averred that if the Claimant was terminated it was done following due procedure as laid down in the Employment Act. The Respondent averred that the suit as drawn offends the mandatory provisions of Cap 39 and 40 of the Laws of Kenya and gave notice that it would raise and argue a preliminary objection at the hearing of the suit to have it dismissed with costs. The Respondent averred that no notice nor intention to sue were issued or served upon it and thus prayed for the claim to be dismissed with costs to the Respondent.

3. The Claimant amended the claim and replaced the prayer for general damages with one for compensation for unlawful dismissal wherein she sought maximum compensation being 12 months pay.

4. The Claimant testified that she was a secretary at the CDS Office in Karatina at present and that she was a former employee of the Respondent. She stated that she had worked for the Respondent for 17 years. She testified that she was served with a letter for misconduct on 21st July 2017 and thereafter was called for a meeting on 4th July 2017 to attend a Board of Management meeting. She said that she attended and was asked to write a letter of apology which she did the same day. She stated that the allegations against her were not read and she was just asked to apologise that she had abused the head teacher. She testified that she was told to go home and that she would receive a call. She stated that after 2 weeks she received a letter which contained an allegation that was not discussed on 4th and she did not respond to the letter. She said she just received the letter which gave her dismissal without notice. In cross-examination she testified that she was given a letter on 6th June 2017 and attended the hearing on 4th July. She admitted that she wrote the apology and never replied to the summary dismissal letter and that the meeting raised 3 issues.

5. The Respondent called 3 witnesses and the first defence witness was Bernard Ndegwa Hunda the headteacher of the Karatina DEB Primary School. He testified that the Claimant was dismissed after deliberate dialogue by the BOM and she admitted to using abusive language and failure to obey lawful direction of the supervisor. He said that the abusive language was directed at the head teacher which is insubordination. He was referred to the summary dismissal letter and stated that it had 9 reasons. He stated that the employer used the grounds for dismissal. He testified that the Claimant was summoned before the BOM and that she was issued with a show cause. He stated that the issue of gross misconduct was raised and this was why she was to appear before the BOM. He said that in his understanding gross misconduct means the issue touching on conduct out of the normal norms. He stated that the letter was not specific but the same was generally there. He stated that in the apology letter she wrote and asked for reinstatement and posting to another department. He said the decision was made by the BOM and he was the secretary of the BOM and was bound by the decision. He said that going by past experience this was an employee used to abusing her supervisor and verbally apologize and then repeat it. He stated that he thought the summary dismissal was for the abusive language and the refusal to obey instruction and that the reasons were captured in the letter. In re-examination

he stated that the charges were all read to her and that even a single abuse of the supervisor was enough to warrant summary dismissal. He stated that the BOM gave instructions for the summary dismissal. The second defence witness was Agnes Njeri Kabui who is a teacher. She testified that she was aware of the case before the court. She stated that the students had gone to the Claimant's place without permission and that she was told of this by pupils. She testified that the Claimant met the BOM and was told what she had done and she gave evidence based on what the students had told her. In re-exam she testified that she was not a member of and did not participate in the BOM issues. The final witness was Betty Wairimu Kinyeki who testified that she was a teacher in Class 8 at Karatina DEB Primary School and that she was aware of the case before the court. She was cross-examined and testified that on 29th May 2017 she was handling a case involving the Claimant because of Class 8 Lenana pupils. Being the class teacher of that class, the Claimant had colluded with pupils and they had an informal meeting. She stated that she was informed by some of the pupils. She testified that on 29th May she was in the office with the deputy and the headteacher when the Claimant came and started abusing the head teacher. She stated the Claimant told the headteacher that Karatina DEB does not belong to him and that she would deal with him. She stated that she was called to the BOM meeting and that she was not the one who recorded the minutes. She said that she gave evidence before the parents. That marked the end of oral testimony.

6. The Claimant submitted that the dismissal was unfair and unlawful. She submitted that she wrote an apology letter in response to the letter dated 29th May 2017 alleging gross misconduct on her part. She submitted that she was called to a disciplinary meeting on 4th July 2017 where she was told to write an apology letter in respect of an incident in which some pupils of the Respondent had visited her when she was sick and for using abusive language while addressing the Respondent's headteacher and causing commotion at the Respondent's school. The Claimant submitted that the alleged gross misconduct of the Claimant was resolved when she was asked to write the apology letter detailing the alleged misconduct. The Claimant submitted that it was therefore unfair to summarily dismiss her through the letter dated 21st July 2017 when the issues forming the substratum of the dismissal letter were even more than the earlier ones alleged in the disciplinary meeting held on 4th July 2017. She submitted that the summary dismissal letter contained new allegations. The Claimant submitted that she was entitled to compensation in terms of Section 49(1)(c) of the Employment Act as she was never issued with a notice to show cause and opportunity to respond to the new allegations. She submitted that the evidence of 17 years service was not controverted by the Respondent through production of documentary evidence as per Section 74 of the Employment Act.

7. The Respondent submitted that the claim by the Claimant was denied in toto and that the Claimant absented herself from work without lawful permission. The Respondent submitted that this warranted summary dismissal under Section 44 of the Employment Act. The Respondent submitted that in the case of gross misconduct, Section 41(2) of the Act ought to apply. It submitted that the Claimant's explanation was not satisfactory and the employer was left with no option but to dismiss the Claimant for gross misconduct as laid down under Section 44(4)(a) and (d) of the Employment Act. The Respondent submitted that the Claimant was not entitled to the remedies sought. The Respondent relied on the case of **Susan Mbithe Kitumu v The BOM DEB Primary School Karatina [2018] eKLR**, the case of **Kazungu Kenga Katana v Ready Consultancy Co. Limited [2015] eKLR** and **Gilbert Kiprono Sang v Ukwala Supermarket Limited [2017] eKLR**.

8. The Claimant was dismissed for gross misconduct. In the disciplinary hearing before the BOM she faced accusations of gross misconduct, to wit, verbally abusing the head teacher and for inviting students of the Respondent to her private function without informing and getting permission from the headteacher. The letter dated 29th May 2017 accused her of causing commotion and disrupted the smooth running of the school. She was accused of leaving her works station without permission and further embarrassed the school with posts on social media. This was deemed as insubordination and demeaning, unbecoming and unwarranted behaviour in breach of the officers code of conduct and amounting to gross misconduct. She was given 2 days to show cause why action should not be taken against her. She responded by writing a letter dated 9th June 2017 headed 'Absenteeism' in which she explained that over the past 2 years she had been absent as she was sick on and off and been hospitalized countless times ostensibly due to an enlarged heart. She stated that she sent another staff member – a teacher with the treatment note and sick leave and apologized for not appearing in person to explain her absence. She wrote another letter on 17th June 2017 headed 'Acknowledgment' in reply to the letter of 29th May 2017 from the Respondent. The Respondent's letter was headed 'Gross Misconduct' and the tenor thereof is reproduced in large part above. The Claimant's reply was that she did not invite students to her residence as she neither had a private occasion on 26th May 2017 nor was she aware of the intention to visit her. She stated in the letter that students heard of her being unwell during April holidays and planned to visit her and she was not informed of their plans. She says in her letter she found the students at her home and her brother was the one who even dropped them at Karatina as they were preparing to leave. On the issue of commotion she indicated that it was an issue beyond her control as she was feeling weak and sickly and decided to rush to the chemist to seek medication and owing to her health condition she collapsed on the verandah not far from the chemist and was unconscious. She came to later and found herself admitted at Jamii Hospital. On the social media posts she categorically stated the posts did not originate from her and that she only heard of it from a parent. She said the posts were regrettable as they tarnished the good name of the School. She stated that if the originator of the posts can be found she would be found blameless. She sought time to discuss the matters with the headteacher if he could find time. In the dismissal letter, the Respondent asserts that due to her gross misconduct on Monday 29th May 2017, the disciplinary meeting held on Tuesday 4th July 2017 where her conduct was deliberated and she was given an opportunity to defend herself, the Respondent found her guilty of insulting the head teacher in front of his junior staff (teachers), inciting pupils against the headteacher, child labour through misusing one of the pupils through collection of left over foods at a fee, inviting students to her house without permission from the head teacher or any other concerned teachers, blocking the head teacher from executing his duties, causing commotion and disrupting smooth learning environment, embarrassing the school by posting the issue above on social media, lying before the BOM that the head teacher attempted to slap her, stating before the deputy head teacher and another teacher that she would deal with the headteacher. The letter went to add that the BOM found her conduct very unbecoming, insubordinative, demeaning, unwarranted and intimidative. She was summarily dismissed without benefits on grounds of misconduct. The dismissal was clearly for matters that were never brought up during the show cause or disciplinary hearing. She therefore was not permitted the opportunity she was entitled to under the law. In my considered view, despite the employer demonstrating that it could have had a reason or reasons for dismissal, the Claimant was not accorded any opportunity to defend herself against the myriad accusations. Indeed at the meeting it seems the only issue that could have arisen was the alleged insubordination for which an apology had been rendered. The dismissal was therefore unlawful and unfair within the meaning of Section 45 of the Employment Act. As such the summary dismissal without benefits is cancelled and her termination reduced to a normal termination for which the employer was to give notice. She is therefore entitled to receive all her terminal benefits. I hereby enter judgment for the Claimant against the Respondent for:-

- a. Reduction of the summary dismissal to normal termination with notice;

b. One month's salary as notice – Kshs. 15,000/-;

c. 6 months salary as compensation Kshs. 90,000/-;

d. Costs of the suit;

e. Interest at court rates on the sums in b) and c) above from date of judgment till payment in full.

9. This decision was rendered online with the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the Judiciary when the stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2020

Nzioki wa Makau

JUDGE